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SUPREME COURT, U.S.

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

## No. 254

Tennessee Survick,

*Petitioner*,

vs.

Honorable William L. Rives, Warden,

*Respondent*.

## REPLY BRIEF OF PETITIONER

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 254

THEODORE STOVALL,

*Petitioner,*

*vs.*

HONORABLE WILFRED L. DENNO, Warden,

*Respondent.*

## REPLY BRIEF OF PETITIONER

Although the counsel for the Respondent litigant has met Petitioner's claim on the merits both here and in the court below, the briefs filed by the Amici District Attorney and Attorney General have raised certain procedural and factual questions which have not been treated with directly by the parties. In this Brief we intend only to deal with those new issues presented by the amici.

### I

1. The Amicus District Attorney insists that Petitioner's counsel is responsible for bringing before the jury the facts relating to the prior identification by Mrs. Behrendt.

This argument ignores the undisputed fact that on the very first day of trial the prosecutor informed the jury that

there would be testimony of prior identification by Mrs. Behrendt,[1] and in fact such promised testimony was given by Mrs. Behrendt on her direct examination.[2]

The exception here taken by the Amicus to the availability to Petitioner of his claim is that trial defense counsel, relying upon the prosecutor's opening address, cross-examined other witnesses as to the suggestive nature of the identification procedure *prior* to the testimony of Mrs. Behrendt.

As Judge Friendly noted below in the panel decision, at R. 29,

> "... defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case."

Judge Moore, first in his panel dissenting opinion and then in the Court opinion upon the *in banc* consideration, took no issue with Judge Friendly's finding that the conduct of defense counsel in no way precluded federal review of the merits. Only in Chief Judge Lumbard's concurring opinion is there any indication that *any* circuit judge thought this question—which essentially involves the order of proof—might be precluded from federal review.

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[1] Petitioner's Brief, p. 6; Folios 237-38.

[2] Petitioner's Brief, p. 33; Folio 2076.
The Amicus District Attorney insists that this opening was a "blunder" (Brief, p. 12) and "ill-advised" (Brief, p. 13). On the contrary, it appears to have been a highly dramatic and effective way of highlighting the forthcoming testimony. In any event, once in, defense counsel was entitled to lessen its impact.

2. Again on a waiver or invited-error type theory the Amicus District Attorney relies upon the absence of objection and trial defense counsel's attack in summation on the validity of the identification as grounds for precluding federal consideration of the merits.

Even if *White* v. *Maryland*, 373 U.S. 59 (1963) were not controlling here, the overall picture is well within the ruling in *Jackson* v. *Denno*, 378 U.S. 368 (1964) where defense counsel did not object to a confession and urged that the manner of taking went only to its weight (378 U.S. at 423-24, dissenting opinion, Clark, J.).

As with the preceding argument, the majority and dissenting judges in both the panel and *in banc* decisions have refused to find a waiver by the absence of trial objection or defense counsel's purported use of the challenged evidence.

At page 11 of the Amicus District Attorney's Brief, footnote reference is made to Petitioner's Brief in Court of Appeals as having,

> "...conceded that the foundation for Mrs. Behrendt's testimony of prior identification had been laid by defense counsel."

There was no such concession made.

The *full* text of the purported concession is:

> "Prior to the testimony of Mrs. Behrendt defense counsel laid the foundation *for the impeachment* of this promised and statutorily authorized evidence of prior identification." (Emphasis added.)

To the degree that the determination by the circuit judges that the claim was preserved for consideration on the merits

rests upon discretion or interpretation of local law, that determination should be unassailable here.

## II

1. The Amicus Attorney General has raised the spectre of retroactivity as a bar to relief.

Apart from the fact that the counsel for the Respondent-litigant raises no such question, the problem is illusory in this case. The right-to-counsel claim is here grounded on this Court's decision in *Hamilton* v. *Alabama*, 368 U.S. 42 which was decided on November 13, 1961, almost a year prior to the trial and conviction of the Petitioner.

2. But both Amici urge that this case is not governed by the capital case rule of *Hamilton* and *White* v. *Maryland*, 373 U.S. 59 (1963), because of the proposed commutation of sentence announced by the Governor of New York.

Apart from the fact that Petitioner is still held under a judgment of death (compare with the proposed pardon in *Fay* v. *Noia*, 372 U.S. 391, 476 [dissenting opinion] which would have mooted that case) the doctrine advanced by the Amici is too unrealistic and unworkable to find sanction in judicial opinion.

This case started out as a capital case and has been treated as such through the state and lower federal courts.[3]

[3] The Governor's statement of June 1, 1965 (Appendix II, Brief of Amicus District Attorney) was made and published seven months prior to the *in banc* decision where all circuit judges treated the case as still a capital case. Indeed that appears to be the expressed intention of the Governor for in a letter to Mr. Stovall (not a part of the record) Governor's counsel on June 4, 1965, informed Petitioner of the Governor's statement and added, "To avoid any pos-

The right which this Court enforced in *Hamilton* is not one which has to remain inchoate until the defendant is strapped into the electric chair. Under the approach of the Amici, enforcement of *Hamilton* must rest upon an arraigning judge's guess as to whether a judgment of death will be imposed and ultimately executed.

3. Not to be overlooked is the fact that one of Petitioner's claims presented *pro se* to the district court (R. 5-8) was that assigned counsel in the state court proceedings failed to petition this Court for a writ of certiorari after representing that he would do so. If, as the Amicus Attorney General suggests, the claim here presented is one which can be raised only directly, as distinguished from collaterally, then the claim of denial of access to this Court takes on constitutional significance.

## III

The Amicus District Attorney has in his argument (Brief, p. 8) and Appendix I, gone beyond the record to recite the Philadelphia experience with counsel at the formal line-up proceedings. Our objection to this amplification of the record is not based upon technical concepts of what should or should not be considered by the Court. Our objection is founded upon the fact that Appendix I does not go far enough, and to that extent is misleading and inaccurate.

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sibility of prejudice to any action which may be pending in the courts, the Governor will not act unless the Court of Appeals has affirmed the conviction and other court actions are concluded."

Also to be noted is that since this case went through the New York courts as a capital case, Petitioner had the benefit of only one appellate review, directly to the Court of Appeals. As a non-capital case, Petitioner would have appellate review available in both the Appellate Division of the Supreme Court and the New York Court of Appeals.

We have been advised by the Defender Association of Philadelphia, that a report by its staff attorney who attended at one of the line-ups referred to in Appendix I of Amicus' Brief, indicated that:

> "Under Philadelphia practice the individual in a formal line-up is lined-up with three other individuals and never alone. The other participants in the line-up may be other prisoners or police officers. The person directing the line-up (a police lieutenant) makes certain that the physical characteristics of the individuals lined-up at any one time conform. The attempt to conform the physical characteristics of the participants relates to their height, weight, age, race and clothing they are wearing."

It was *because* the agency was satisfied with fairness of the then Philadelphia procedure that the considered decision was made not to appear at the line-ups.

We offer this non-record material to rebut the "inutility of lawyers" argument advanced on the basis of the Philadelphia experience.

We suggest that perhaps the line-ups in Philadelphia are fair ones because of the fact that they are not secret and always subject to visitation by counsel; and we suggest that it is only because the procedure is a fair one that Philadelphia counsel have made the choice not to attend. Where Philadelphia counsel thought the line-ups were unfair a challenge was in fact made.[4]

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[4] The Philadelphia defender agency has attacked the line-ups only on the theory that it is an equal protection violation to line up only those defendants who are too poor to be released on bail. See, *Rigney* v. *Hendrick*, 355 F. 2d 710 (3rd Cir., 1965).

## IV

The Amicus District Attorney's Brief (pp. 2-3) and the Respondent contend that necessity compelled the prompt production of Petitioner before Mrs. Behrendt. This misconception deserves to be laid to rest, for neither in fact or law did Mrs. Behrendt " . . . cling uncertainly to life. . . . " as the Amicus has alleged.

Dr. Montgomery testified that he operated on Mrs. Behrendt at about 2:00 a.m. on August 24th, cleaning her wounds and sewing up the lacerations (Folios 733, 737). About thirty-six hours later the Petitioner was taken by Detectives Rofheart and Stalter to the hospital (Folios 1138-1141, 1807). They waited outside while Mrs. Behrendt was taken from her bed, put into a wheelchair and taken to the adjoining room where the show-up took place (2271-2272). This, together with the presence of the group of officers and prosecutors negates the factual assumption of the Respondent.[5]

Even apart from the factual fallacy of the Respondent's argument, the argument is untenable as a matter of law.

If Mrs. Behrendt were in danger of death, the identification procedure would have meaning only if made as part of a dying declaration. No attempt whatsoever was made to have the show-up identification meet the rigid test of the

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[5] In his dissent Judge Friendly, at R. 58, notes:

> "Grievous as Mrs. Behrendt's injuries had been, nothing in the record indicates that her life was any longer considered to be in peril when Stovall was brought before her; the presence of five police officers and prosecutors in her hospital room would argue to the contrary—and also tends to negate the suggestion that Stovall had to be brought in alone."

common law requirements of a dying declaration.[6] The absence of such procedure compels the legal conclusion that the show-up was not impelled by the impending death of the only eye-witness.

Respectfully submitted,

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[6] Under New York law, a dying declaration is one which is " . . . made in extremity, when the party is at the point of death and when every hope in the world is gone" *People* v. *Gezzo*, 307 N.Y. 385, 393 (1954). Stated another way, there must be a " . . . settled, hopeless expectation that death is near at hand and what is said must have been spoken in the burst of its impending presence" *People* v. *Miller*, 270 App. Div. 107 (1945).